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James J. Blanchard

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OVERVIEW OF CANADA/U.S. DISPUTE MANAGEMENT AND SETTLEMENT: WHERE WE ARE IN TERMS OF SUCSESSES AND FAILURES – A U.S. PERSPECTIVE

*James J. Blanchard**

Nortel is a very proud Canadian company, employing 30,000 people and investing millions, actually billions each year in research and jobs for Canadians. We are located all over the United States and all over the world.

Let me thank you, Henry, for your leadership. It has been fun watching Henry operate. Talk about a man who ought to be running for office. I asked Henry King, Jr. last night to tell me about Henry King, Sr. He said he was a lawyer, and a politician. Surprise, surprise. Henry, last night your display of memory of names going around the room equaled that of all the top politicians, including the current president and those who would like to be president.

This is the first time I have shared a platform with Donald Macdonald. Actually, we never spent any time with each other. He is not just a legend in Canada, but he is in U.S./Canadian relations. I want to salute you for being the father of free trade. I know you are still a young man, but everything you have done for our two countries to provide for the free flow of not just goods and services, but ideas and people will be remembered by all of us involved in U.S./Canadian relations forever. Thank you.

I also want to thank you, George Haynal. Is George still here? He gave a thoughtful address last night in midst of much consumption of alcohol. He acquitted himself quite well.

I am going to try to give an overview of Canada/U.S. relations and dispute resolution. Those of you who are scholars and professors and practicing attorneys can deal with the details and more of the substance than I will. I deal with U.S.-Canadian relations and dispute resolution at the political level, and that, of course, has a lot to do with whether people have the will to resolve disputes, whether they be environmental, economic, or political.

I thoroughly enjoyed being the U.S. Ambassador to Canada. I have been blessed to have served in the U.S. Congress for eight years and I was the Governor of my home state, Michigan, for eight years. I was Ambassador to Canada for three years. I had done all that by the time I was fifty years old.

*Blanchard bio.

When I was a young kid dreaming of a political career, if somebody would have told me that I would have had the opportunity to do all three of those things, I would have thought that I had died and gone to heaven.

Being Ambassador to Canada, interestingly enough, involved all the same issues that I dealt with as a congressman or governor. Ambassadors, if they know what they are doing, have a lot more influence on policy than anyone can imagine. The job was a fascinating blend of politics and diplomacy in government. It was exciting, it was challenging, and I must say it was a heck of lot more fun than being a governor or congressman. As a matter of fact, that house that they gave me in Ottawa, high on the hill overlooking the mountains and the Ottawa River and the Gatineau River, was a place we still think about. We lived as well there as anyone in the foreign service. It really was a fascinating time. One gets to deal with every issue as the U.S. Ambassador to Canada, unlike other countries, from the space station to Haiti to NAFTA to tracking the Russian Mafia in terms of law enforcement, to trying to improve the water quality of the Great Lakes, or to dealing with issues in Kosovo and Bosnia. You can name almost any issue, domestic or foreign. We are working cooperatively with Canada.

I find that far too often, members of our cabinets of both sides of the border forget that every other department and agency is at the same moment working on something, just as well as they are, and their issue is not the only one in town. So it is really not just the fact that we were allies in World War I and World War II, Korea, and the Persian Gulf, or Founders of the United Nations, or NATO or Partners at North American Aerospace Defense Command (NORAD), or the Organization for Economic Cooperation and Development (OECD) or the G-7, or all of the other alphabet organizations. This is a living, breathing, dynamic relationship in which, often times, some of these institutions may even stand in the way of a smooth relationship. But this relationship does sustain millions of jobs on both sides of the border; jobs for people and families, and, of course, it helps protect the very air we breathe and the water we drink in very real terms.

If you just take trade, we are talking about a billion dollars a day. It used to be a billion dollars Canadian a day, then it became a billion dollars U.S. currency. I am sure it is more than that now. I am sure it is upwards of 400 billion dollars U.S. a year. It could be more than that. That trade supports about six and a half million jobs on both sides of the border. Until recently, the Michigan-Ontario trade exchange was greater than it is with the United States and Japan. That is no longer the case, but it is still very significant; and Ohio-Canadian trade is very substantial as well. It is growing by leaps and bounds.

I remember when I proposed that we open up a Toronto office on trade and investment and tourism back in 1987 or 1988. My legislature criticized me. We already had a mature relationship. They felt there was not much more that could be done. But, since then, trade has tripled. It has actually gone up by more than sixty percent since NAFTA. There were some that said we did not need NAFTA because we already had the Free Trade Agreement. The United States does more trade with Canada than we do with all the European nations added up.¹ It is huge. I want to underscore that, because as you develop your ideas and thoughts in the different sections, you are invariably going to hear from people who are going to wring their hands because they believe that dispute resolutions are not working. They complain that there is this problem and that problem. If you focus on a few details, you will find there are still some problems, but overall, I absolutely believe dispute resolution and relations between our countries is going extremely well on almost all the significant issues. I am not the only diplomat who would say that. I cannot speak for him, but I assure you Ambassador Chretien who is serving in Washington this very day would say something similar.

If you look at the range of things, it is really remarkable. I mentioned trade. If you take a look at energy, we Americans receive as much oil each year from Canada as we do from Saudi Arabia.² We are out talking and visiting all these oil sheiks and we are trying to get them to increase oil production. Right next door, Canada is providing the United States with more energy than any nation on the face of earth.³ As I said, Canada supplies as much oil as Saudi Arabia does. When you add natural gas and other forms of energy, it is a huge business and there is not a single dispute concerning it about which I am aware.

Leonard Legault will talk about the environment. He is a leader in that area and he is a distinguished diplomat. Our environmental relationship really began in 1909 with the Boundary Waters Treaty, negotiated by Teddy Roosevelt and Sir Wilfrid Laurier and consummated in 1909.⁴ We have had about thirty-five or thirty-six other environmental agreements since then; covering everything from acid rain to preserving wild life. It is really significant that many nations this very day do not have an environmental

¹ See JAMES J. BLANCHARD, *Border Skirmishes and Open Skies*, in *BEHIND THE EMBASSY DOOR: CANADA, CLINTON, AND QUEBEC* 124 (1998).

² *Id.*

³ *Id.*

⁴ Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary, Jan. 11, 1909, U.S.-Can., 36 Stat. 2448, 12 Bevans 319 (entered into force May 5, 1910) [hereinafter *Boundary Waters Treaty*].

agreement with their neighbors. We have had a living, breathing agreement since 1909.

As far as security goes, as I speak there are 100 Canadians, and 300 Americans working inside Cheyenne Mountain in Colorado Springs as part of the NORAD,⁵ monitoring the skies. They are able, within a very few minutes, to detect the launch of any object in the sky anywhere in the world. Within about six or seven minutes, they are able to know what its trajectory is and the estimated time of arrival. We all take that for granted.

Disputes have been managed and balanced extremely well. However, since we are involved at so many levels, we are going to have disagreements. It is also true, that if these issues are not managed properly, little issues can mushroom into very big ones in a hurry and dominate the headlines, particularly in Canada, and dominate the headlines in the trade press in the United States. The reason for that is not just that Canada has one-tenth as many people as the United States. To some degree, the War of 1812 is fought through each morning by those reporters; a joke please, a joke.

The reason they get a lot of play is that issues do resonate domestically. If you are a wheat farmer on one side and if you agree with the wheat farmer on the other side, you end up getting criticized. I remember a time I went to Windsor. A local environmental commentator asked me when we were going to close down the Detroit incinerator. Actually, we were in the process of trying to put in the latest and best technology on the smokestacks. But these issues resonate domestically. They can in Congress or in Parliament or in the newspapers or in the provincial parliaments and they become very big issues quickly, especially if they are not managed.

George Haynal used the word intermestic relationship. I thought that was a new word, but I thought it was a good one. Of course, press coverage can be incredible. I remember when we had a dispute over wheat.⁶ In fact, most of the big disputes are over agriculture, whether there is too much supply, or over fish, where there is not enough supply. I saw an address by President Kennedy at the University of New Brunswick when he was a Senator. He talked about fish and agriculture, making a remark similar to what I just made.

During the dispute over wheat, Senator Conrad, a good man, a good Senator, made a joke at a hearing in Washington. He said, you know all those

⁵ North American Aerospace Defense Command.

⁶ On August 1, 1994 Canada and the United States agreed to settle their dispute over wheat imports. In the settlement, both parties agreed that Canadian wheat imports into the U.S. would be limited for a one-year period. In return, the U.S. agreed to withdraw its proceedings against Canada under the GATT. The settlement also established the Joint Commission on Grains.

missiles we have in North Dakota that are pointed toward Russia, maybe we ought to turn them on the Canadians. Well, he was joking, of course. But, it was not taken like a joke in the Canadian press. I was flooded with calls; "how dare you declare war on us, you are so militaristic and, Mr. Ambassador, if you have any clout with President Clinton, you will have Senator Conrad thrown out of the Democratic caucus." I had to laugh. Our system works a little differently. We do not throw anybody out of any caucus. Every vote is a free vote in the United States. In Ottawa, there are very few free votes.

The *Sports Illustrated*⁷ dispute was one, in my opinion, that should have been resolved a year before it was. If we had let Gordon Giffen, the U.S. Ambassador, and Raymond Chretien, the Canadian Ambassador, handle it, they would have had the dispute resolved. I believe it would have been put to bed much earlier than it was. But, there was just too much hay being made in the press for a lot of different reasons, and that was unnecessary. It did, however, finally get worked out.

By the way, the toughest issue in recent years has been *Pacific Salmon*.⁸ No species is safe with modern technology in mobile fleets and when there is such a desire to make money. That is the reality of fishing in the world, including off the Atlantic and the Pacific Coasts. We tried and tried to get special negotiators and special fact finders. They were all helpful. But, the truth is that when David Anderson, who is the Minister of Fisheries in Canada, decided to try to do the impossible, something no one else dared to attempt, the deal got put together.

Those were the two most thorny issues in last twenty-four months. They have been resolved to the credit of diplomats and people of good will. In fact, earlier, you may recall, the Fisheries Minister, my dear friend, Brian Tobin, now Premier of Newfoundland, slapped a transit fee on U.S. ships. I remember hearing from some of our Senators that we ought to send the Navy in there. These are the kind of calls you get when you are Ambassador; really good stuff. Anyway, we worked it out.

We still have some problems with lumber. That is the only big dispute on the horizon. The lumber agreement expires next March.⁹ My guess is a deal will be cut; the sooner, the better. If it drags on into an election year or into a

⁷ Canada – Certain Measures Concerning Periodicals, Panel Report, (WT/DS31/R) Mar. 14, 1997; Report of the Appellate Body, (WT/DS31/AB/R), June 30, 1997.

⁸ Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, (1998) 35S B.I.S.D. 98 (Panel Report adopted Mar. 22, 1998).

⁹ In the Matter of Certain Softwood Lumber Products from Canada, ECC-94-1904-1-USA; Memorandum Opinions and Order, 3 Aug. 1994.

new administration, it is going to end up being resolved with the threat of lawsuits which would make it more difficult to work out.

You are going to hear from Donald Macdonald. You are going to get some wisdom from him. You are getting political information from me. There is a great book about U.S./Canadian relations that I happened to have written called *Behind the Embassy Door*⁸. It is actually a human interest book. It is not political science. My mother thought it was fantastic. I loved writing it. I loved the job so much, I wrote this book. It is a very pro-Canada book, I might add, but it is also pro-public service, pro-politics, pro-getting involved.

I suggest that you read it because it characterizes how I see disputes. I wrote one chapter on trade disputes called "Border Skirmishes."¹⁰ Most of it is about the Quebec referendum; what it is like to be an Ambassador; and the differences between Americans and Canadians. But, over time, while I watched all these foreign policies and trade disputes erupt between our two countries, I came to realize that they always follow the same vicious cycle. Canadian politicians and their advisors get lured into showing how tough and independent they really are, and usually end up walking the plank. But the final deal, no matter how advantageous to Canada, could never be good enough for the Canadian press. Whatever the ultimate compromise, they lambaste the politicians and the negotiators as spineless weasels who have sold out to the Americans or have been taken to the cleaners. But, if the American politician or negotiator has a problem with Canada, that becomes highly publicized. He or she is generally viewed as ineffective, maybe even morally deficient. Generally speaking, Americans have a feeling that if you can not get along with the Canadians, you are probably inept or downright wrong. That is why I concluded that disputes between the United States and Canada are no-win propositions for both sides. They are best resolved calmly and without publicity. I do not have anything more to add to that, other than if you drag out a dispute, both sides lose, in my opinion. We need to find quiet and quick ways to resolve things. We ought to give our diplomats a little more latitude to work things out, short of threats by the political people on both sides. I have done both. I really want to applaud all of you. We do need to anticipate problems and, more importantly, work on an affirmative agenda. I found that if you allow the bureaucracy of both countries to deal with the normal disputes, they fall into the normal ruts of softwood lumber or wheat or supply management programs.

⁸ James J. Blanchard, *Behind the Embassy Door: Canada, Clinton, and Quebec* (McClelland & Stewart 1994).

¹⁰ See BLANCHARD, *supra* note 1.

I went up to Ottawa with one huge goal, other than to do a good job representing the President and advancing U.S. interests in representing the American people. It was to try to get a New Open Skies Agreement between our two countries. Negotiators had tried to get one for thirteen different rounds of negotiations for over twenty years. We were able, by getting the Prime Minister's office involved and the White House and different cabinet people, to work out a framework to do that. People told me that I would never get this done. But because it was a positive agenda, it was something that could be proven to be a win-win situation on both sides. Because we were not dealing with the same old arguments, we were able to do it.

That is one of the keys for taking what is already a very good relationship, a very good partnership, and making it even better. I want to commend our two governments. They took this to another level by recently creating what was called the Canada/U.S. Partnership Forum, which will feature regular meetings between the Assistant Secretaries and the Assistant Deputy Ministers of Foreign Affairs, Transportation, Justice, Customs, and Immigration. The meetings will help to anticipate and coordinate, and help to handle smoothly all these issues relating to border management.

This is a good thing, as is the International Joint Commission (IJC). The IJC, unlike all these other panels, does not sit around with six members and ram down resolutions by a four to two vote. They rule by consensus; they work by consensus, which is a wonderful thing. They do not make rulings unless they are all on board, which, obviously, minimizes disputes; and they refer fact finding to special committees of scientists and technical people. So they come back with facts, or the facts as best they can tell before they start talking about policy implications.

That is a good model; the whole relationship is a role model. What I find interesting is not just that the U.S./Canadian relationship is taken for granted, which it is on both sides of the border, although it is taken for granted more so on our side. But it is surprising we get along so well, given the multitude of issues and the instant communication that we all receive from the media. The differences in our countries are a lot greater, between the two of us, in terms of our outlook and culture than people realize, even though we all look alike out there. It is not just a different history or geography; it is a totally different political system. Every four or eight years, all of our top people change. We have civil servants and career people in place, but they do not have nearly the influence or authority as does the Canadian government. It is just a totally different system between a representative democracy of three branches of government and two Houses in one branch and a parliamentary system.

The U.S. system was designed not to work. It is true. It was designed to thwart the consolidation of power, to thwart any potential King, with all of our checks and balances. You have to have a huge majority to get anything done in our system. Whereas in Canada, all power is essentially in the House of Commons in the majority party. I used to tell my Canadian friends that they have no excuse. Their government was set up to be efficient. It is true. Their culture is different, which is why things do not move as quickly as they might. It is fascinating. When our negotiators would meet, I always found myself, if they were new people doing the negotiating, not if they were old hands, trying to interpret to each side what different words meant.

For example, if you tell an American that you have tabled a proposal, they think you have deep-sixed it; put it aside. In Canada, that means present. It is interesting how words mean different things. I also found the reserved Canadian culture contrasted with the aggressive American culture. If you had to categorize the two countries, it is the Canadians who are the negotiators. Canadians love the process. They may negotiate forever because they like it so much. I do not know exactly what that is, Scottish or what.

Americans are litigators. We are the most litigious people on the face of the earth. The lawyers here know that. On any given day, a major auto company in the United States will have 4,000 products liability lawsuits pending. In Canada, there will only be twelve. In Europe, there would only be six. Gee, – I hope I do not sound anti-law. I am an attorney with a respectable law firm. We do not handle product liability, though.

We can go on and on. The understated nature of the Canadian culture makes for very interesting meetings, because in the American culture, we have a way of turning everything into an entertainment art form, whether it is the O.J. Simpson trial or the sad saga of Elian Gonzalez. It has become entertainment. It is sad, but true.

I will not go any further, other than to tell you that despite the fact I found Canadians hardy, wholesome, fun-loving, and the most honorable people with whom I have ever lived or worked, Canadians are shameless nitpickers, and they nitpick each other worse than the Americans.

On the other hand, Canadians could very easily say that Americans are the world champion B.S.'ers. You are looking at a serious elder statesman B.S.'er. We are the best.

So there are differences, as I said. There is nothing etched in stone, nothing in scriptures that ordains that two countries living so close together with so much in common would get along so well. But we do. It is not just a partnership that works; it is not just the envy of the world, at least of those in the world who follow our relations. It is a model for the world; and I want to congratulate all of you for contributing and making this, the most special

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relationship between any two countries on the face of the earth, even better in the days and months and years ahead.

